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VLADIMIR ZEMLYAKOV
20 EMERSON COURT
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MAR 25 2009

OFFICE OF PETITIONS

In re Application of :
Zemelyakov et al. :
Application Number: 10/017280 : ON PETITION
Filing Date: 12/07/2001 :
For: UPPER EXTREMITY :
EXOSKELETON STRUCTURE AND :
METHOD :

This is a decision in reference to the letter filed on January 5, 2007, which is treated as a renewed petition to withdraw the holding of abandonment.

The petition is again **DISMISSED**.

This application became abandoned on November 7, 2003, for failure to timely submit corrected drawings and respond to the examiner's interview sent with the Notice of Allowability mailed on August 6, 2003, which set a three (3)-month statutory period for reply. Notice of Abandonment was mailed on June 3, 2004.

On June 21, 2004, a petition to withdraw the holding of abandonment was filed. On March 30, 2006, the petition was dismissed. On May 25, 2006, a renewed petition to withdraw the holding of abandonment was filed. On July 11, 2006, the petition was again dismissed. On September 7, 2006, a paper styled as a petition, signed by only one inventor, was filed, requesting withdrawal of the holding of abandonment. On November 14, 2006, a letter in response was mailed, stating the petition was again dismissed. On January 5, 2007, the subject petition was filed.¹

¹ A status request was filed on October 17, 2007, and on February 17, 2009.

Applicants argue, in pertinent part, that the holding of abandonment should be withdrawn because a proper and timely response to the Interview Summary was in fact filed.

Petitioners essentially argue that the amendment, including drawings, which petitioners has shown was filed on August 7, 2003 (certificate of mailing date), sufficed as both a response to the non-final Office action mailed on July 16, 2003, and to the Interview Summary mailed on August 6, 2003, with the Notice of Allowability.

Petitioners' argument has been considered, but is not persuasive. Assuming, *arguendo*, the drawings filed with a certificate of mailing were timely filed, petitioners were notified in the decision on petition mailed on March 30, 2006, that the drawings are not in compliance with 37 CFR 1.84 and 1.152. As such, corrected drawings are required, and the application could not have issued as a patent using the drawings filed to date. As petitioner has not shown that proper drawings were filed prior to the expiration of the period for reply to the Notice of Allowability, the application became abandoned for failure to submit proper drawings in response to the Notice of Allowability mailed on August 6, 2003. Petitioners were advised in the decision mailed on March 30, 2006, of the need for new corrected drawings.

In this regard, 35 U.S.C. 133 states:

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Director in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Director that such delay was unavoidable.

As petitioners failed to provide proper drawings within the time period provided in the Notice of Allowability, the application is abandoned.

Further, with regard to petitioners' argument that the Office had accepted certain papers from the applicant that were not signed by both *pro se* applicants, although the USPTO attempts to notify parties as to defective papers in order to permit timely refiling, it has no obligation to do so. See In Re Columbo, Inc., 33 USPQ2d 1530, 1532 (Comm'r Pat. 1994). Rather it is the

applicants who are ultimately responsible for filing proper documents. Id.

Any request for reconsideration must be filed within **TWO MONTHS** of the date of this decision. **This period may not be extended.**²

ALTERNATIVE VENUE

Petitioners are strongly advised to consider filing a petition under 37 CFR 1.137(b), which now provides that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after 8 June, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application, abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Director may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

² 37 CFR 1.181(f).

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly.

A copy of the form for filing a petition under 37 CFR 1.137(b) to revive an application unintentionally abandoned is enclosed herewith for petitioners' convenience. The petition fee is currently \$810.00 for a small entity.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By FAX: (571) 273-8300
Attn: Office of Petitions

By hand: Customer Service Window
Mail Stop Petitions
Randolph Building
401 Dulany Street
Alexandria, VA 22314

Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3231.



Douglas I. Wood
Senior Petitions Attorney
Office of Petitions

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